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No. 07-582

IN THE
SUPREME COURT OF THE UNITED STATES

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Petitioners,

v.

FOX TELEVISION STATIONS, INC., *et al.*,

Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

BRIEF FOR *AMICI CURIAE* FORMER FCC COMMISSIONERS AND OFFICIALS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are former commissioners and officials of the FCC who oppose the recent indecency enforcement actions of the Commission.[1] We are a bipartisan group with different views about some issues of radio and television regulation, such as the fairness doctrine, but we are of one view on the issue before this Court: the FCC's new indecent policy overreaches the agency's statutory and constitutional authority.

Mark Fowler, currently a wireless radio project investor and entrepreneur, was Chairman of the FCC from 1981 to 1987. Jerald Fritz, Sr. Vice President and General Counsel for Allbritton Communications Company, served as Legal Advisor and Chief of Staff to FCC Chairman Mark Fowler from 1981 to 1987. Henry Geller, retired, served as General Counsel of the FCC from 1964 to 1970, as special assistant to the Chairman in 1970 and was Administrator of the National Telecommunications and Information Administration from 1978 to 1981. Newton N. Minow, Senior Counsel at Sidley & Austin, LLP, was Chairman of the FCC from 1961 to 1963. James H. Quello, a communications policy consultant, was FCC Commissioner from 1974 to 1997 and served as interim Chairman in 1993. Glen

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[1] No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than the *amici curiae* or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. The parties have been given at least 10 days notice of the intention of *amici* to file.

O. Robinson, the David A. and Mary Harrison Distinguished Professor of Law Emeritus at the University of Virginia, was FCC Commissioner from 1974 to 1976. Kenneth G. Robinson, a Washington, D.C. communications attorney, was Senior Legal Advisor to FCC Chairman Alfred Sikes from 1989 to 1993, as well as senior policy advisor to five Assistant Secretaries of Commerce for Communications and Information.

As former FCC commissioners and officials, *amici* have been personally associated with the indecency controversy in the past, and we are not without sympathy for the FCC's concerns. Indeed, two of us joined in the Commission's original *Pacifica* decision,[2] and a third participated in an earlier decision that partly anticipated *Pacifica*.[3] However, we have been dismayed by a series of recent decisions that have transformed a hitherto moderate policy of policing only the most extreme cases of indecent broadcast programming into a campaign of regulatory surveillance that will chill the production of all but the blandest of broadcast programming. Unless the FCC's current indecency enforcement policy is halted, it will greatly curtail live broadcasts of virtually any event. It will also unbalance competition in media, by imposing far more stringent content rules on one group of competitors (broadcasters) than on other media, and for no compelling policy reason. For these reasons, we

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[2] *Pacifica Foundation Station WBAI(FM)*, 56 F.C.C.2d 94 (1975).

[3] *Eastern Educational Radio*, 24 F.C.C.2d 408 (1970).

support the court's opinion below as an attempt — albeit an incomplete one — to constrain the Commission's new crusade.

SUMMARY OF ARGUMENT

The FCC's policy towards broadcast indecency has evolved from a restrained effort to regulate clear, flagrant instances of indecent language by a handful of broadcast licensees and performers into an ever-expanding campaign against ordinary radio and television programming. In pursuit of a policy of protecting children against exposure to extremely offensive language, the Commission has embarked on an enforcement program that has all the earmarks of a Victorian crusade. To effectuate its new clean-up-the-airwaves policy, the Commission has radically expanded the definition of indecency beyond its original conception; magnified the penalties for even minor, ephemeral images or objectionable language; and targeted respected television programs, movies, and even non-commercial documentaries.

The FCC's actions in this case are but a few of several recent actions taken by the Commission that exceed the boundaries originally set by the FCC and assumed by the Supreme Court in the *Pacifica* decision. We endorse the decision of the court of appeals that the agency acted arbitrarily, in violation of the Administrative Procedure Act, by altering its past practice of not treating transitory and isolated utterances of offensive language as a violation of its indecency policy. Further, we do not believe the question of administrative arbitrariness can be

isolated from the deeper free speech issues that lie at the heart of this controversy. The Government's attempt to frame the issue before this Court as simply one of administrative procedure ignores what the court of appeals made clear: the issue of reasoned analysis is inextricably bound up with a fundamental constitutional question. While the court labeled its treatment of the First Amendment issue as *dicta*, it clearly expressed its judgment that the FCC's failure to offer a reasoned explanation for its new "'fleeting expletive' regime"[4] was not merely a procedural defect but was a constitutional defect as well. It was precisely for this reason that the court analyzed the First Amendment implications of the new policy, expressed with unambiguous clarity that the fleeting expletive policy is not within the scope of the *Pacifica* doctrine, and declared its skepticism that the FCC could provide a justification for its policy that would satisfy the First Amendment. For this Court to focus only on the administrative law issue and remand the constitutional question to the

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[4] While this case concerns the so-called "fleeting expletive" policy, we should note that the indecency regulations are also enforced against fleeting images as well. *See Complaints Against Various Television Licensees Concerning Their February 2, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, 21 FCC Rcd 2760 (2006). The Court of Appeals for the Third Circuit recently reversed that decision, *CBS Corp. v. FCC*, _ F.3d _, 2008 WL 2789307 (3d Cir. July 21, 2008). Like the lower court in this case, the court found the FCC's sudden change in policy towards fleeting words or images to be arbitrary and capricious. It also held that the Commission had incorrectly imposed vicarious liability on CBS for the actions of independent contractors.

court of appeals would only prolong the uncertainty, and prolong the chilling of free speech.

However, even if the Court accepts the Government's argument that review should focus only on whether the FCC's change in policy was arbitrary and capricious, it cannot deal with that question adequately without taking into account the fact that the constitutional question bears directly on the rationality of the agency's action and whether any deference is due the agency. The deference that is normally accorded agency policy judgments cannot be defined or applied without evaluating how the FCC's new indecency policy affects First Amendment values. On that latter issue the agency bears a heavy burden of persuasion for which deference is inappropriate. Thus, even on the narrowest reading of the lower court's decision, it must be affirmed.

ARGUMENT

I. THE FCC'S EVOLVING STANDARDS OF INDECENCY

Until its 1975 decision in *Pacifica Foundation Station WBAI(FM)*, 56 F.C.C.2d 94 (1975), the FCC interpreted 18 U.S.C. § 1464 as an obscenity statute, governed by the constitutional definition and constraints of *Miller v. California*, 413 U.S. 15 (1973). The statutory proscription of "indecent or profane" language was treated as synonymous with obscenity. Although some of the pre-1975 cases might have been debatable candidates for the application of *Miller*, they had never forced the Commission to consider a different standard under

the rubric of indecency or profanity. *Pacifica* was different: George Carlin's monologue on the seven words that "you couldn't say on the public, ah, airwaves," clearly did not satisfy the first prong of *Miller's* definition of obscenity, requiring that the material "appeals primarily to the prurient interest." Confronted on the one hand with a choice of declaring Carlin's monologue to be obscene and inviting certain reversal in court, and on the other hand dismissing the complaint as *damnum absque injuria*, the FCC proceeded to invent a third option, which was to give independent significance to "indecency" but prescribe a different scope for its regulation than that applied to obscenity. Traditionally this Court has treated obscenity as unprotected speech and as such subject to total suppression. In contrast, indecent speech called simply for time and place regulation; the time being the period when children were likely to be in the audience,[5] the place being radio and television broadcasts.[6]

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[5] The FCC originally did not set precise time limits. The present period, set first by the FCC and then by Congress, is between the hours of 6 a.m. and 10 p.m.

[6] Indecency controls have been limited to broadcast media, but the current FCC Chairman, Kevin Martin, has endorsed extending indecency controls to cable and satellite providers. *See Broadcast Decency Enforcement Act of 2004: Hearings on H.R. 3717 Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 108th Cong. 87 (2004) (Statement of Kevin Martin, Commissioner, FCC). Even assuming the continued viability of *Pacifica*, extending indecency beyond broadcasting would be deeply problematic in light of *United States v. Playboy Entertainment*

The Commission's move was novel; there was no judicial precedent and little administrative precedent to support it. But it was also very limited. Except where it qualified as obscenity, indecent language was generally confined to that describing "sexual or excretory activities and organs" in a manner that was "patently offensive" as measured by contemporary community standards for the broadcast medium, at times of day when there is a reasonable risk that children may be in the audience. 56 F.C.C.2d at 97-98. The Commission made clear that it was concerned only with "clear-cut, flagrant cases" and emphasized "that it would be inequitable to hold a licensee responsible for indecent language" when "public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing." *Petition for Reconsideration of a Citizen's Complaint against Pacifica Foundation Station WBAI(FM),* 59 F.C.C.2d 892, 893 n.1 (1976). This announced policy of restraint was critical to how this Court viewed the new doctrine when it affirmed the FCC in 1978. *Pacifica Found. v. FCC*, 438 U.S. 726 (1978). As Justice Powell noted in a concurring opinion, "the Commission may be expected to proceed cautiously, as it has in the past." *Id.* at 756, 760, 761.

Group, Inc., 529 U.S. 803 (2000), where the Court held that the ability to block cable channels distinguished cable from broadcasting and thus required a higher degree of constitutional scrutiny. *See also Reno v. ACLU,* 521 U.S. 844 (1997) (*Pacifica* cannot be applied to the Internet); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (*Pacifica* cannot be applied to telephone where there are adequate means of preventing access by children to "dial-a-porn" messages).

The FCC honored that expectation. Immediately after the Supreme Court affirmed *Pacifica*, the FCC rejected a petition by Morality in Media to deny a license renewal for one of the foremost educational stations in the country on the ground that it had consistently broadcast "offensive, vulgar and otherwise harmful material to children." *WGBH Educ. Found.*, 69 F.C.C.2d 1250 (1978). The Commission held that the Court's decision "affords this commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station. We intend strictly to observe the narrowness of the *Pacifica* holding." *Id.* at 1436. To underscore the point, then-Chairman Charles Ferris announced that another case like *Pacifica* was "about as likely to occur again as Halley's Comet." Charles D. Ferris, Chairman, FCC, Address to New England Broadcasters Assoc. (July 21, 1978).

Unfortunately Ferris's prediction was unduly optimistic. Halley's Comet makes a periodic appearance about every 76 years; indecency reappeared before the FCC in just nine. In 1987, the FCC was drawn back into the indecency issue by the appearance of "shock radio" that was designed to push the limits of provocative programming beyond what Carlin had attempted a decade earlier. Still, the FCC responded with restraint. It revised its post-*Pacifica* view that the enforcement policy was limited to the precise seven words of Carlin's famous monologue and reinstated the original "generic" policy instead. The Court of Appeals for the District of Columbia affirmed the FCC's generic policy, albeit not without reservation and with an admonition to

the FCC to proceed cautiously. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). Echoing Justice Powell in his *Pacifica* concurrence, the court pointedly noted its assumption that "the potential chilling effect of the FCC's generic definition will be tempered by the Commission's restrained enforcement policy." *Id.* at 1340 n.14

The decision was to be the first act of a three-*ACT* play in which the FCC, Congress, and the court of appeals took turns exploring the permissible limits of the new indecency regime.[7] We will not examine the plot in detail except to observe that in the course of the play, three things were firmly established. *First*, the proscription on indecency was limited to certain hours; the First Amendment forbids a 24-hour ban.[8] *Second*, the Commission was required to apply the indecency restrictions on a consistent basis and was barred from discriminating against commercially sponsored programs or stations.[9]

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[7] There was a fourth *ACT* case, but it dealt only with a constitutional and statutory challenge to the procedures for enforcing 18 U.S.C. § 1464. *Action for Children's Television v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995). The court rejected the challenge.

[8] In the second "act," *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), the court struck down Congress's attempt in 1989 to eliminate the indecency "safe harbor."

[9] *See Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996) (affirming the ban on indecency between the hours of 6 a.m. and 10 p.m. for all stations; reversing the use of broader period, 6 a.m. to 12 a.m., for commercial stations).

Third, the court was seriously concerned about the risk that the regulation of indecency could get out of hand. Its repeated references to the need for caution in defining and enforcing the restrictions, reversal of Congress's attempt to make the restrictions absolute, and insistence on a consistent and principled policy make clear that the court was alert to the danger that a policy of reining in a small number of broadcast provocateurs could easily become a vehicle for an unconstitutional morals crusade against the entire industry.

In the aftermath of the *ACT* cases, the Commission continued to view indecency as a problem of controlling a small number of rogue broadcasters and broadcast personalities like Howard Stern, whose syndicated talk show has been responsible for a very large percentage of all fines paid for indecent broadcasting over the past score years.[10] In 2001, the FCC issued a set of guidelines

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[10] In 1995, Infinity Broadcasting paid a then-record sum of $1.7 million to settle indecency complaints over a series of Howard Stern Shows. Paul Fahri, *Stern "Indecency" Case Settled; After 7-Year Fight With FCC, Broadcasting Firm to Pay $1.7 Million*, Wash. Post, Sept. 2, 1995, at F1. That was not the last of it. The Howard Stern Show continued to draw fines. A single show on April 9, 2003 resulted in the Commission issuing a notice of apparent liability, to Clear Channel stations carrying the show, for fines aggregating $495,000. *Clear Channel Broadcasting Licensees, Inc.*, 19 FCC Rcd 6773 (2004). The Howard Stern Show will no longer draw indecency fines. In January 2006 Stern left commercial radio to join Sirius, a subscription-based satellite radio provider. *See* Howard Kurtz and Frank Ahrens, *Sirius Lands a Big Dog: Howard Stern*, Wash. Post, Oct. 7, 2004, at A1. The FCC has not applied its indecency regulations to subscription media. *See Harriscope of Chicago*, 3 FCC Rcd

on indecency policy, but they did not announce any new policy. *See Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999 (2001).

Yet, the time was not far off when things would change — radically. In 2004 the FCC embarked on what then-Chairman Michael Powell described as the "most aggressive enforcement regime in decades." Hearings on H.R. 3717 at 79. He could have more precisely said "the most aggressive enforcement regime" *ever*. Not only did the Commission find more violations and impose more penalties in that one year than in the entire prior history of the indecency doctrine,[11] it greatly expanded the scope of what constituted indecency, as in its extraordinary and unprecedented ruling in the Golden Globe Awards decision that a single, spontaneous exclamation — "Fucking brilliant" — by Bono upon receiving the award was indecent. *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd 4975 (2004) ("*Golden Globe*").[12] To

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757 n.2 (1988), *remanded on other grounds*, *Monroe Commc'ns Corp. v. FCC*, 900 F.2d 351 (D.C. Cir. 1990).

[11] In 2004, the FCC issued assessed nearly $8 million in proposed fines and settlements, compared to $440,000 a year earlier. So far the 2004 total is the high water mark for annual collection. *See Indecency Complaints and NALs:* 1993-2006, http://www.fcc.gov/eb/oip/ComplStatChart.pdf.

[12] In ruling that a single use of the F-word was a violation, the Commission overturned its own prior limitation of indecency to descriptions or depictions of "sexual and excretory activities and

magnify the impact still further, the FCC decided that each utterance of a forbidden word may be counted as a separate violation, instead of looking at a particular program as a single, integrated unit. *See Clear Channel Broadcasting*, 19 FCC Rcd at 6779.

The Commission's new campaign also moved beyond the traditional targets for indecency enforcement. With a few exceptions those targets for enforcement were radio talk shows that deliberately and repeatedly followed a pattern of provocative programming. In its new phase, however, the Commission has undertaken a close inspection of movies, regular television series, live events, and even educational documentaries, to locate objectionable language or images. Even critically honored television programs like "Without a Trace" and "NYPD Blue" have become targets of indecency patrols. *See, e.g., Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without a Trace,"* 21 FCC Rcd 2732 (2006) (finding violation and proposing forfeiture of $32,000 for each CBS owned or affiliated station carrying program); *Complaints*

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organs." To shore up this new expansion the FCC also declared that use of the F-word was "profane" — a definition that again departed from precedent, as well as from conventional linguistic understandings. As late as 1999, the Commission took the position that not only was mere profanity not part of its indecency policy, but it could not constitutionally be made a part. *See Federal Communications Commission, the Public and Broadcasting*, 1999 WL 391297 (a "manual" for the public, containing an overview of broadcast regulatory policy).

Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 FCC Rcd 2664, 2696-98 ("*Omnibus Order*") (finding violation but imposing no forfeiture for "NYPD Blue" program), *on remand*, 21 FCC Rcd 13299 (2006) ("*Omnibus Remand Order*"), *rev'd sub nom. Fox Television Stations v. FCC*, 489 F.3d 444 (2d Cir. 2007).[13] "NYPD Blue" has been targeted twice. *See Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue,"* 23 FCC Rcd 3147, 3156 (2008) ("NYPD Blue") *appeal pending*, Nos. 08-0841-ag(L), 08-1424-ag(CON), 08-1781-ag(CON), 08-1966-ag(CON) (2d Cir.) (imposing forfeiture of $1.43 million for briefly depicting backside nudity).

II. *FOX* AND THE OMNIBUS ORDERS

The Commission's *Omnibus Order* and *Omnibus Remand Order* reversed by the court of appeals illustrate all of these radically expansionist moves.

To begin, the Commission has unmoored indecency from its original meaning of language that described or depicted sexual or excretory activities. In the new version indecency can mean as little as the casual use of an expletive. For example, in the *Omnibus Order* the Commission found that the

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[13] The Commission's remand decision in the *Omnibus Order* dismissed the complaints against "NYPD Blue" on a procedural ground; however, this dismissal does not alter the substance of its earlier finding that the program contained indecent and profane language. *See Omnibus Remand Order*, 21 FCC Rcd at 13328-29.

documentary, "The Blues: Godfathers and Sons," broadcast by a noncommercial educational station, was indecent because some of the artists being interviewed used the F-word or S-word. 21 FCC Rcd at 2684-85. Citing its earlier decision in *Golden Globe*, the Commission held that "any use of [the F-word] or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition." It went on to say that the S-word similarly "has an inherently excretory connotation." *Id.* at 2684. The Commission's new "inherency doctrine" is preposterously out of touch with the way language is used and understood today. It may be that Twila Tanner (in a live interview) describing a fellow contestant on "Survivor: Vanuatu" as a "bullshitter" was vulgar. *Id.* at 2698-2700. However, only a silly literalist would think that she was describing an excretory function.[14] When Cher (in another live

[14] Given the Commission's view that excretory words inherently satisfy at least the first prong of its indecency test, presumably the same holds for the word "poop" — a word that is prominent in the title of a number of popular children's books, such as, "Everyone Poops," "Where's the Poop," "The Dog Poop Initiative," "The Truth About Poop." No doubt the Commission would say that while "poop" satisfies the first prong, it does not satisfy the second, "patently offensive," prong. Words like "ass" and "piss" and their derivatives are included in the Commission's catalog of "sexual or excretory activities," but they have been ruled not patently offensive — at least in the context presented. *See Omnibus Order*, 21 FCC Rcd at 2710-13. Thus, according to the Commission, it is offensive to call someone a "bullshitter," *id.* at 2698-2700, but it is all right to call him an "ass," *see id.* at 2712, or even a "dickhead," *id.* at 2696. You may never say "fuck ´em" — even in an off-handed way, *id.* at 2690-92 — but it is at least sometimes ok to say "up

broadcast) answered her critics by exclaiming "fuck ´em," *id.* at 2690-92, any viewer would understand that as a crude insult, not as an invitation for sexual activity.

In an attempt to bolster its expansive definition of indecency, the Commission in its 2004 *Golden Globe Awards* order, and again throughout the *Omnibus Order* and *Omnibus Remand Order*, declared that the F-word and S-word, and derivative words, are not only indecent, but also "profane" within the meaning of 18 U.S.C. § 1464. It defined "profane" to mean any language "so grossly offensive as to constitute a nuisance." *See, e.g., Omnibus Order*, 21 FCC Rcd at 2699. On that interpretation "profane" so completely overlaps "indecent" as to render the latter superfluous. For just that reason the court of appeals found the interpretation to be unreasonable. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 467 (2d Cir. 2007). We agree with that finding, but the larger import of the FCC's interpretation is to underscore just how ambiguous and subjective the process of content surveillance has become. The Commission has in effect inflated section 1464 to cover any language the Commission thinks constitutes a nuisance.

The concept of arresting a "nuisance" was, of course, always central to *Pacifica* — in both the Commission's formulation and the Court's — but there is a difference between an organizing concept

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yours" with all deliberate intensity, *id.* at 2712. (The FCC is silent as to whether the presence or absence of an accompanying digital gesture is relevant.)

and a set of rules for implementing it. In its original formulation the FCC did not claim that it had a free-roaming power to regulate the broadcast program schedule according to whether, in the FCC's *ad hoc* judgment, a particular program was a "nuisance." In fact it was once so concerned about opening a Pandora's box of enforcement demands that it limited the category of offending words to those of the Carlin monologue. That limitation was arbitrary, but it reflected an appreciation of the First Amendment dangers of allowing the policy to drift onto an open sea with no compass other than the label "nuisance" to guide it. Even when the Commission abandoned the seven-word limitation in favor of a more "generic" policy, it was mindful of the need to articulate limits on the scope of that policy and to adhere to restraint in its enforcement. Unfortunately, since 2004 the FCC seems to have concluded that it needs no compass other than its own *ad hoc* judgments, based on little more than its own subjective consideration of "context."

The FCC professes to consider the offending words (or images) in "context." While we agree that words and images should be assessed in context, context cannot be an excuse for the subjective and arbitrary judgments reflected in the FCC's current indecency jurisprudence. In the name of context the Commission mechanically recites that the offending language is "gratuitous" and "shocking," presumably to distinguish these cases from "Saving Private Ryan," where the repeated use of the same words is deemed to be "essential" to the artistic work. *See, e.g.*, *Omnibus Order*, 21 FCC Rcd at 2685, 2688-89, 2692, 2696-99. Employing an artistic standard

unknown to real artistic directors, the FCC determines that the S-word is "essential" when it is part of a war film, but "gratuitous" when it is part of a television series about gritty police work in New York City. *See id.* at 2696-98 (distinguishing "NYPD Blue" from "Saving Private Ryan"). Perhaps the Commission intends to embrace Justice Stewart's famous test for obscenity: "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

The plain fact is that "context" has now become a tool not for limiting the reach of the Commission's indecency regime, which was its original purpose, but for expanding it. This new expansiveness exposes the deeply troubling vagueness of indecency as a basis for regulation. The argument of unconstitutional vagueness had been earlier finessed based on FCC assurances of cautious enforcement. *See ACT I*, 852 F.2d at 1339-40. However, it can no longer be ignored, as the court below found: "[W]e are hard pressed to imagine a regime that is more vague than one that relies entirely on consideration of the otherwise unspecified 'context' of a broadcast indecency." *Fox Television*, 489 F.3d at 464. Except for the Commission's stubborn refusal to acknowledge the problem it would go without saying that this vagueness not only offends due process norms of fair notice, it produces subjective and arbitrary judgments that enhance the chilling of protected speech.

What is at stake here is not simply the problem of assuring fair notice and equal treatment to broadcasters who have to discern the elusive — and

shifting — boundaries of indecency/profanity. Equally important is the loss of speech from self-censorship by risk-averse broadcasters who choose to steer clear of the landmines that the FCC's uncertain jurisprudence has created by avoiding anything that might conceivably give offense. And it will not be simply the Bono's and the Cher's the broadcasters will have to avoid. A Vermont public radio station recently chose the path of ultra caution when it came to hosting a debate among electoral candidates for the Senate. The station decided to bar one of the candidates because during a previous student forum he had lost his temper and called two students "shits." The station manager reported that he feared the candidate might again become excited and use similar language, thereby subjecting the station to the possibility of a forfeiture "as much as $325,000."[15] http://www.vnews.com/campaign2006/ussenate20061020.htm.

No doubt this manager was unusually risk averse, but a small public radio station might well think that the risk was not worth taking when it could be so easily avoided. Who could say that the manager is wrong? If the candidate had blurted out the S-word in a fit of fury during the broadcast, the station's non-commercial status or small size would not protect it. *See Omnibus Order*, 21 FCC Rcd at 2683-87 (San Mateo County Community College television station found in violation for expletives

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[15] This is the cap recently set by the Broadcast Decency Enforcement Act of 2005, Pub. L. 109-235, § 2, 120 Stat. 491, amending 47 U.S.C. § 503(b), for "each violation or each day of a continuing violation" of 18 U.S.C. § 1464.

uttered in documentary). Nor would the spontaneity of the utterance be a defense. *Id.* at 2690-92 (violation found for failure to have a delaying technique to avoid such spontaneous expletives such as Cher's F-word). Of course, the Vermont station could invest in costly tape-delay equipment to protect itself against this kind of risk, but it would be hard to fault the manager of a tiny public radio station for concluding the game was not worth the candle. It is so much easier to "just say no."

More recently the issue surfaced in connection with a planned PBS telecast of the acclaimed stage production of "King Lear" starring Ian McKellen. A famous scene in the stage play has the mad king disrobe to display full frontal nudity. This prompted a question whether this scene can be included in the TV production given its planned 9 p.m. broadcast schedule. Responding to that question the head of PBS remarked that "it's what I think about it and what the FCC will allow." Lisa de Moraes, *Nude Developments at PBS? You'll Have to Stay Tuned*, Wash. Post, July 14, 2008, at C1. She did not reveal what she thought about it, but as to what the FCC will allow, who can say? Mindful of the FCC's recent ruling that a rear view of a nude woman is "titillating" and "shocking," *see "NYPD Blue,"* 23 FCC Rcd at 3168, this is not an idle question. One alternative for PBS would be to risk a bet that the FCC would distinguish between frontal nudity of an old man (McKellen is 69) and the rear nudity of a young woman, or perhaps to give a special

dispensation for Shakespearean drama.[16] But who knows? There is no way to know in advance, and one could not fairly blame PBS if it takes the easy way out and directs Mr. McKellen not to do "the full monty."

III. THE POLITICS OF INDECENCY REGULATION

The FCC's enforcement actions make it appear as if there has been some rampant growth in broadcast indecency, and indeed a casual inspection of the number of recorded public complaints might suggest as much.[17] The number of complaints is misleading, however, and the FCC's reference in the *Omnibus Order*, 21 FCC Rcd at 2665, to "hundreds of thousands of complaints between February 2002 and March 2005" is disingenuous. The FCC is fully aware that the overwhelming percentage of recent complaints target a handful of programs, and most of them are computer-generated electronic complaints

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[16] In *Pacifica*, this Court noted that the case did not involve an "Elizabethan telecast," *Pacifica*, 438 U.S. at 751, a hint perhaps that classical drama might warrant special standards. The FCC presumably would say, simply, that it is all a matter of "context" — meaning we will know it when we see it.

[17] In 2004, the number of complaints was reported to be just over 1.4 million, of which a large percentage was generated by an email campaign by Parents Television Council and other activist citizen groups. In 2005, the number of complaints fell to just over 233,000. In 2006, the number rose again, with just over 275,000 reported for the first quarter of 2006. *See Indecency Complaints and NALs: 1993-2006*, http://www.fcc.gov/eb/oip/ComplStatChart.pdf. The FCC's website does not show more recent statistics.

provided by activist groups such as the Parents Television Council.[18] In some cases the FCC's complaint count has even included duplicate complaints from the same person to different commissioners and staff as separate complaints. To further underscore the artificiality of the complaint process, the FCC has recently held that it will act on complaints even if the complainant does not claim to have watched or heard the program. *See "NYPD Blue,"* 23 FCC Rcd at 3156.[19] The Commission's policy of acting only on complaints has become so artificial that it naturally prompts the question, why does the FCC not simply turn the monitoring function over directly to the Parent's Television Council? The question has a simple answer: the FCC already has.[20]

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[18] This is fully documented in a study of indecency complaints by the Progress and Freedom Foundation. *See* Adam Thierer, *Examining the FCC's Complaint-Driven Broadcast Indecency Enforcement Process*, *Progress on Point* no. 12.22, Nov. 2005, www.pff.org/issues-pubs/pops/pop12.22indecency enforcement.pdf. A Freedom of Information Act request by the Wall Street Journal revealed that of some 6500 complaints filed against an episode of "Without a Trace" (for which CBS and its affiliates drew record fines, 21 FCC Rcd 2732 (2006)), all but three of the complaints were computer-generated form letters provided by Parents Television Council. Amy Schatz, *Networks Fight Rising Number of FCC Fines*, Wall St. J., May 19, 2006, at B1.

[19] The FCC does require that it be shown that the programs were aired in the market from which the complaints emanate. *See Omnibus Remand Order*, 21 FCC Rcd at 13328-29.

[20] Parents Television Council has been in the front of the recent indecency campaign, but it is not alone. Other activists include

Adding to the influence of activist crusaders like the Parents Television Council, the FCC has also been influenced by congressional pressure. In 2003 and 2004, the Senate and House adopted resolutions that not only declared the FCC should be more vigorous in its enforcement of indecency but should specifically overrule its enforcement bureau's finding of no violation in the *Golden Globe Awards* case. S. Res. 283, 108th Cong. (2003); H.R. Res. 500, 108th Cong. (2004). The FCC responded, both in the *Golden Globe Awards* case and in this case. Shortly thereafter, Congress reaffirmed its desire for tougher enforcement by enacting the Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, § 2, 120 Stat. 491 (2006), *amending* 47 U.S.C. § 503(b), to authorize increased forfeiture penalties. It is quite unexceptional as a general matter for an agency to be responsive to congressional policy directives, but the agency must also conform its actions to the rule of law. The Act did not define any new standard of indecency or profanity. Moreover, neither the Act

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Morality in Media, American Family Association, American Decency Association, Family Research Council, Christian Coalition, and American Values — to give only a partial list. For many of these groups the indecency issue is part of a more general religious and moral agenda. *See, e.g.*, http://www.ouramericanvalues.org/about.php. (describing the group's purpose as "defending life, traditional marriage, and equipping our children with the values necessary to stand against liberal education and cultural forces"); *see also* Kimberly Zarkin, *Anti-Indecency Groups and the Federal Communications Commission: A Study in the Politics of Broadcast Regulation* 71-80 (2003) (describing American Family Association campaigns against programs that it deems to be pro-homosexuality, anti-family or anti-Christian).

nor the earlier resolutions of the House and Senate can constitutionally direct law enforcement policy. Elementary separation of powers principles forbid Congress from exercising executive (and especially prosecutorial) powers in this fashion. *See Bowsher v. Synar*, 478 U.S. 714 (1986). Finally, it should go without saying (but sometimes even the obvious bears repeating): Congress cannot insulate the indecency standard from First Amendment constraints.

The Government seeks to frame the issue simply as what must be shown for an agency to change its policy and within that framework what degree of deference should be shown agency policy-making judgments. Government Brief at 20-21. But the real issue here is not whether an agency is free to change its mind or whether it is entitled to some judicial deference in choosing among policy options: of course it is. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). The core question is whether an agency is entitled to deference in regard to the permissible scope of content regulation under the First Amendment: of course it is not. Because the "rationality" of the agency's action here necessarily implicates this latter question, it calls for a strict scrutiny that precludes deference. Thus even accepting the Government's position that review should be limited to whether the FCC's change in policy is "arbitrary and capricious" under the standards of the Administrative Procedure Act, it is inappropriate to extend *State Farm* deference to the agency's action.

We acknowledge that in *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195-96 (1997), this Court noted that Congress is entitled to deference in making legislative judgments even where they raise First Amendment issues. It compared that deference to the deference owed to administrative agencies, thereby implying that an agency empowered by Congress to make policy judgments was similarly entitled to deference. However, the deference given to Congress (and indirectly to the FCC) in *Turner* is irrelevant here. First, a majority of the Court held that *Turner* did not involve content-specific regulation calling for strict judicial scrutiny. This case unarguably does, and so puts the posture of judicial review in a completely different light: the Government bears the extremely heavy burden of proving both a compelling purpose and a least restrictive approach to satisfying that purpose. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000). Second, *Turner* involved difficult issues of economic predictions about the effects of various policy options, which find no counterpart here. On matters of direct content regulation that necessarily implicate the First Amendment, *even Congress* is not accorded deference. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989). It would be peculiar indeed to extend a form of deference to the FCC that not even Congress can command.

Even apart from the constitutional issue, there would be little basis for deference in this case. The usual argument for deference to agency policy-making judgments is that the agency has been delegated a degree of discretion based on its special

expertise. A determination of what constitutes indecency does not entail any such expertise; but even if it did, the FCC has not exercised any. It has simply capitulated to public clamor and political pressure. No expertise is involved in reading emails sent by angry viewers who want the FCC to act as surrogate parents. No expertise is required to understand a threat from a congressman (also responding to the same angry viewers). A.C. Nielsen (the premier agency for surveying television-viewing preferences) at least employs sophisticated sampling techniques to ascertain viewer preferences in a reasonable fashion. The FCC simply opens its email.

Indeed, as mentioned earlier, the agency does not even bother to insist that the complaints come from a person who has viewed or heard the program in question. It treats them as votes, not complaints. The distinction between complaining and voting is subtle but important. In the case of voting one merely records the expressed preference — for or against. It is irrelevant how the preference is formed — whether it reflects any deliberative thought or indeed whether it even reflects the true views of the voter on the matter at hand. By contrast, a complaint normally carries with it the assumption that the complainant at least has some individual grievance. As this Court has long recognized, there is an important difference between persons with an individual grievance on the one hand and a purely ideological interest on the other. *See, e.g., Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 771 (1990). We do not argue that the FCC is bound to ignore ideological complainants altogether, but it should candidly acknowledge that its so-called "complaint" process is

being manipulated by ideological activist groups, rather than attempting to pass off artificially-hyped "complaints" as evidence of large-scale discontent.

In all events, the FCC must be reminded that even genuinely popular support for regulating indecency cannot confer authority on it to do so. The public has a right to complain; after all that is part of their First Amendment rights. But if the First Amendment means anything, it also means that the right to complain is not a license to deprive speakers of their right to speak or listeners/viewers of their right to hear or see the speaker's message.[21] It is no response to say that speakers or listeners/viewers are not deprived of their rights because the affected speech is not censored but simply moved to a different time in the broadcast day. Such "time zoning" necessarily affects the accessibility of the speech to audiences desiring to hear or view it, and this in turn affects the producer's decision whether it is worthwhile to produce it.

IV. THE COURT'S OPTIONS

The court below held that the FCC had failed to give a rational justification for its fleeting expletive policy. The Government now argues that this is purely a question of administrative procedure, one

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[21] While the First Amendment is formally directed at the right to speak, a corollary of that right is that others are permitted to hear (or view) the speech that might be suppressed by regulation. Thus, it is not only the rights of broadcasters or program producers that are at stake here, but also the rights of listeners and viewers.

that can be isolated from the First Amendment question which, it argues, should be remanded to the Second Circuit for further consideration. Government Brief at 20-22, 42-43. The Government asks this Court to engage in an artificially narrow reading of the lower court's decision. Notwithstanding that the lower court characterized its analysis of the First Amendment issue as "*dicta*," its analysis was an integral part of what made the FCC's new policy arbitrary and capricious. To isolate the court's treatment of administrative arbitrariness from the First Amendment issue that animated it is simply to turn a blind eye to the real controversy over indecency regulation. The Government's proposed course of action appears to be purely strategic, perhaps to give the agency a bit more time to pound the broadcast industry into submission. The question of constitutionality was fairly raised and fully argued below; it will not be changed by asking the Second Circuit to jump this hurdle again. The crucial point here is that the indecency policy approved by this Court in *Pacifica* is not the policy that the agency is now enforcing. That was the conclusion of the court below, and we think the Court should not now finesse the issue in order to permit a few more "i"s to be dotted and "t"s to be crossed.

But even if the Court accepts the Government's proposed approach and limits its review to the question of administrative rationality, we see no way to avoid the First Amendment implications of what the FCC is doing. The Government urges deference to the Commission's decision as if the standards of rational justification can stand independently of the fact that the policy is about how much speech can be

infringed in the name of protecting children against speech that offends. But judicial scrutiny of agency policies (or policy changes) affected by a constitutional interest is of a different order than scrutiny of those affected by a mere "public interest, convenience or necessity." The FCC routinely defends the constitutionality of its new policy by citing *Pacifica*. But neither as a matter of administrative rationality nor of constitutional authority does *Pacifica* provide any basis for deferring to the FCC's judgment for two reasons: one, the indecency policy that is now being enforced is not the policy that was before the Court in 1978; and two, this Court's First Amendment jurisprudence has evolved since 1978, as exemplified by *Sable Communications* (1989), *Playboy* (2000), and *ACLU v. Ashcroft*, 542 U.S. 656 (2004).

For both these reasons, we think *Pacifica* provides no defense for the Commission's radical new indecency policy, whether that policy is addressed in terms of administrative arbitrariness or the First Amendment. We believe, therefore, that, at a minimum, this Court should declare that the fleeting expletive policy is beyond the boundaries established in *Pacifica*. Further, at some point the Court must recognize that changes in both the electronic media and in First Amendment jurisprudence have altered the premises of *Pacifica* itself. This Court has previously acknowledged the need to account for changes in electronic media, because "solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973)

(striking down restrictions on broadcaster's ability to refuse to carry political broadcasting). This observation was never more apt than it is today.

A central consideration underlying the Court's decision in *Pacifica* was that broadcasting was considered to be "uniquely pervasive." Whatever the accuracy of that label in 1978, it cannot be reasonably claimed today that broadcasting is uniquely pervasive. Today only 14% of television households rely on over-the-air programming from conventional broadcast stations; the rest subscribe either to cable or satellite — classified by the FCC as "multi-channel video program distributors" ("MVPD"). *FCC Public Release on 13th Annual Report on Video Competition*, p. 3, 2007 WL 4197270 (2007). Given the overwhelming reliance on MVPD, it is simply incoherent to treat broadcast programs as "uniquely pervasive." *See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 744-45 (1996) (Breyer, J.) (plurality) (finding the pervasiveness factors cited in *Pacifica* applicable to cable television).[22]

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[22] In light of the broadcasting-is-different mantra it bears noting that the foremost technological feature that has been thought to make broadcasting different from other media — the use of scarce spectrum — was not part of the indecency doctrine in *Pacifica*. *See Pacifica*, 438 U.S. at 770 n.4 (Brennan, J., dissenting) (noting that both the majority opinion by Justice Stevens and the concurring opinion by Justice Powell "rightly refrain from relying on the notion of 'spectrum scarcity' to support their result"). Whatever types of regulation may be justified by spectrum scarcity in today's age of electronic plenty, the regulation of indecency surely is not one of them. After all, the whole premise of indecency controls is "less is more."

In the Internet age the same observation holds for online viewing. The same programs that the FCC considers indecent when broadcast can be seen on YouTube. Indeed, because they are archived, they can be seen and seen again. No one knows how many children saw the 2003 Golden Globe award show when Bono exclaimed the F-word on receiving the award. But it is a fair guess that a larger number will see it on YouTube, where it has been archived since 2007. http://www.youtube.com/watch?v=COlPQlNguvU. Yet in *Reno v. ACLU*, 521 U.S. 844 (1997), the Court ruled that *Pacifica* could have no application to the Internet. Among other things, the Court in *Reno* reasoned that the Internet, unlike broadcasting, is not "invasive" and does not "appear on one's computer screen unbidden." *Id.* at 849.[23] The idea that broadcasting is specially invasive seems somewhat strained. It conjures up an image of hapless captives of the video monitor who are unable to defend themselves even with a remote

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[23] The relationship, if any, between the "invasiveness" factor cited in *Reno* and the "uniquely pervasive" factor cited in *Pacifica* is unclear. Apropos the latter, however, it should be emphasized that the Internet is far more pervasive today than it was in 1997. Perhaps more importantly, the emergence of video streaming has brought it much closer to broadcast television. Video streaming is especially popular with children. The most recent monthly viewing data from Nielsen Online shows that in June 2008 there were 8 million children age 2-11 who viewed an average of 51 streams and 118 minutes of online video per person per month, and 11.6 million teens who viewed an average of 74 streams and 132 minutes. The amount of viewing by each group exceeded that of the larger adult population of online viewers (75.1 million). *See* http://www.netratings.com/resources.jsp?section=btn_filter&nav=5.

control that can change channels faster than a speeding bullet.

Be that as it may, the surprise factor was effectively destroyed by *Playboy* because it is simply incredible to suppose that there is any greater surprise when a program arrives via shielded conduit than when it arrives over the air.[24] The same is true for Internet video. In 1997 it might have been plausible to suppose that children would not stumble upon offensive language or images online because most users searched for discrete content. In today's era of streaming video the element of surprise is as likely for online video as it is for broadcast video. Ultimately, the surprise argument is a non-starter in any event because the Commission no longer cares whether the viewer has prior notice. In its recent indecency decision involving ABC's "NYPD Blue," the Commission refused to give any weight to the fact that the program was preceded by a warning because it found the depiction of a woman's buttocks was "shocking and titillating." *"NYPD Blue,"* 23 FCC Rcd at 3168.

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[24] In the *Omnibus Remand Order,* 21 FCC Rcd at 13320, the Commission claimed that cable was different from broadcasting in that "parents who subscribe to cable exercise some choice in their selection of a package of channels, and they may avoid subscribing to some channels that present programming that, in their judgment, is inappropriate for children." The Commission ignores the fact that cable operators package channels in tiers, not individual channels (except for pay-per-view). More importantly cable channels are essentially like broadcast channels in presenting a mix of programming, so the viewer's options are essentially the same for both media.

The more salient point about the Internet-versus-broadcast comparison is the one made in *ACLU v. Ashcroft.* In upholding a preliminary injunction against enforcement of the Child Online Protection Act, 47 U.S.C. § 231(a) (1), the Court relied on the fact that blocking and filtering technology appeared to provide an effective and less restrictive alternative to the criminal sanctions the Act imposed; unless the Government could prove that this technology was inadequate, the Act was unconstitutional.[25] *Ashcroft*, 542 U.S. at 670; *see also Playboy Entm't*, 529 U.S. at 826.

Equivalent technology is available for television, such as the V-chip device. In its *Omnibus Remand Order*, 21 FCC Rcd at 3168-69, the FCC dismissed the V-chip as a solution to broadcast indecency on the ground that most television sets do not contain the device; parents are unaware of it or do not know how to use it; and in any event it will not work where the program is not accurately rated, or cannot be rated for unanticipated utterances. This cavalier dismissal of the V-chip device is stunning. What was the point of Congress's mandating the V-chip technology, 47 U.S.C. § 303(x), or the Commission's approval of an industry ratings system to work with that technology, *Video Programming Ratings,* 13 FCC Rcd 8232 (1998), if parents are to be told that

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[25] While the Court remanded for further hearings on that issue, on remand the lower court found that available filtering technology was an effective and less restrictive alternative. *See ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff'd sub nom. ACLU v. Mukasey*, _ F.3d _, 2008 WL 2801759 (3d Cir. July 22, 2008)

they do not need the V-chip and do not need to learn how to use it because the FCC will take care of the matter for them?[26] We concede that filtering devices like the V-chip are not a solution for all offensive-content cases, but that fact cannot excuse the FCC's complete indifference to self-help measures where they are available.

The debate over the efficacy of the V-chip device for broadcasting is a red herring in any event. Cable and satellite subscribers have long had access to the same "targeted" blocking technology that the Court cited in *Playboy* as a basis for finding an adequate, less restrictive alternative to governmental censorship. *See* 529 U.S. at 815. The effectiveness of such blocking technology will increase with the full deployment of digital technology, as the Court in *Playboy* also noted. *Id.* at 808. The 14% of broadcast signals that are not now delivered over cable or satellite will be increasingly served by digital sets where channels can be shown or hidden or can employ the V-chip. With such less restrictive means available to parents, the First Amendment does not allow the FCC to act as "Supernanny" for children

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[26] The Commission reports that most television viewers who have a V-chip device are either unaware of it or do not know how to use it. *Omnibus Remand Order*, 21 FCC Rcd at 13319-20. That fact would not distinguish them from the equal number of computer users who do not know how to install or operate the filtering software available for their computers, which this Court in *Ashcroft* found to be, potentially, a less restrictive alternative to government regulation. It is the *availability* of individualized filtering devices, not the *actual use* of them, that constitutes a less restrictive alternative. *See Ashcroft*, 542 U.S. at 669-70.

whose parents cannot be bothered with shouldering their proper burden.

CONCLUSION

In 1983, Ithiel de Sola Pool, a distinguished political scientist and student of communications law, described *Pacifica* as "legal time bomb" that would explode into "radical censorship." Ithiel de Sola Pool, *Technologies of Freedom* 134 (1983). Indecency regulation was then in its infancy, and the Commission's enforcement policy in the immediate aftermath of *Pacifica* seemed to render such predictions hyperbole. As it happened, Professor Pool was prescient, in ways that those of us who were involved in indecency regulation in its infancy did not appreciate at the time. This case is merely one example of what Pool predicted. With flags flying in pursuit of the new enemy of good taste in broadcasting, the FCC has aimed its guns at the broadcast industry and, echoing Commodore Perry in the Battle at Lake Erie in 1813, has announced, "we have met the enemy and he is ours." More accurately it might have echoed Pogo's twist on Perry's quip: "we have met the enemy and he is us."

We urge the Court to recognize that the fleeting expletive policy is beyond the pale of the very special and limited indecency doctrine this Court approved in *Pacifica*. This would be an important step towards rescuing the First Amendment from a runaway regulatory process. But it would be an incomplete step for three reasons.

First, merely eliminating the fleeting expletives policy would leave untouched the larger problem of

ascertaining offensiveness in "context." In the Commission's new indecency jurisprudence, "context" has become a talisman to ward off serious questions about the extreme subjectivity of the agency's determinations. The Commission's distinction between "Saving Private Ryan" on the one hand and "NYPD Blue" on the other has become the iconic example of this subjectivity: the FCC wants us to believe that the S-word is not indecent and profane when it is uttered by (fictional) soldiers but is when uttered by (fictional) police officers. This arbitrariness is repeated throughout the FCC's new case. One example tells it all: "bullshitter" is offensive but "dickhead" is not. The nearest precedent for this new "linguistic turn" is Lewis Carroll's Humpty-Dumpty.[27]

Second, the lines that may have once separated over-the-air broadcasting from the other electronic media where the Court has refused to allow indecency regulation have disappeared. Broadcasting is no longer unique, and it is time for the Court to bring its views of the electronic media into alignment with contemporary technological and social reality.

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[27] "'When *I* use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less'

'The question is,' said Alice, 'whether you *can* make words mean different things.'

'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'"

Lewis Carroll, *Through the Looking-Glass* 94 (Random House 1946).

Third, the indecency controls that began as a limited tool for reining in a small number of provocative broadcast personalities and irresponsible licensees have become a rallying cry for a revival of Nineteenth Century Comstockery. As long as these controls are tolerated they will encourage new political pressures for content regulation. As former regulators we appreciate that the FCC is in an uncomfortable position, buffeted by the turbulent passions of anxious parents and threats from excited congressmen. But that is precisely why the matter must be taken out of the agency's hands entirely. The FCC has now made strong commitments to a program of expanded and more vigorous enforcement in response to political pressure. We do not expect that pressure to disappear whatever this Court's ruling, but a clear decision of unconstitutionality will at least have the salutary effect of removing the agency's discretion to respond to it.

For all the foregoing reasons, *amici curiae* Former FCC Commissioners and Officials request that this Court affirm the judgment of the Second Circuit.

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